IS IT MEANINGFUL TO DESIGNATE A SOCIETY AS "DEMOCRATIC"?

DFM Strauss[1]

1. INTRODUCTION

One of the expressions most frequently occurring in literature on political philosophy (political theory) is found in the phrase "democratic societies". Its more restricted form is given in the reference to "democracies" – intended to describe what is known as the constitutional state under the rule of law (German: *Rechtsstaat*), sometimes also designated as a "liberal democracy". In the latter case, the term "democratic" is also used as an adjective, namely when people from all walks of life refer to a "democratic state". Through an analysis of the meaning of the noun "society" and of the adjective "democratic" two main perspectives will be advanced: (i) That the diverse types of social entities found within a differentiated society are each unique and governed by their own inner laws (an intuitive idea found amongst the most prominent political philosophers of our time – including Weber, Münch, Habermas and Rawls); and (ii) that the democratic element in a state is limited to the constitutionally specified election process through which a government is put in office. Since the scope of the adjective "democratic" is limited and restricted an alternative will be proposed – rather to speak of a "just state" – briefly alluding to the recent experiences in South Africa and Africa. Furthermore, it will be argued that owing to their typical uniqueness those social entities in a differentiated society distinct from the state are strictly speaking not democratic. Therefore we shall argue that the expression "democratic society" should be avoided.

However, because our focus is upon what is known as a democratic society we shall commence by analyzing the meaning of these two terms in separation before their combined employment will be scrutinized. This procedure will at once demarcate the scope of our considerations and it will provide a rationale for our concern that the use of the expression "democratic society" may in fact lead to a totalitarian view of state and society. Only after these elements are subjected to an analysis will it be meaningful to consider their combined occurrence in the expression "democratic society". A crucial connection between these two subsections will be articulated inasmuch as it will appear that both our views of society and the state are largely informed by the opposing perspectives of atomism and holism.

Since the word "society" is the substantive qualified by the adjective "democratic" we begin with an analysis of its meaning.

[1] Research Fellow, Faculty of Humanities, UFS. E-mail: dfms@cknet.co.za

2. SOCIETY

In spite of the hypothetical (and therefore a-historical) conjecture of a pre-societal condition found in modern theories of the so-called social contract, humankind has never lived "outside" society. The oldest human ways of co-inhabitation are known as the extended family. Although it is sometimes asserted that segmented (or acephalous) societies existed without "rulers",[2] it cannot be denied that all known undifferentiated societies do display an internal social structure. Kammler (1966) distinguishes between undifferentiated and differentiated societies. The former lacks a significant technology and within them the realization of political and administrative, economic, juridical, cultic religious, and educational functions initially bound together in the family bond is still absent, or they are at least only present in a rudimentary form. Although differentiated societies (designated as "complex societies" by Kammler) do reflect a social stratification and unilateral relations of super and subordination, relations of super and subordination are not absent in undifferentiated societies. Some undifferentiated groups of hunters and collectors already knew the institution of slavery.

The ties of blood connecting the members of an extended family continued to play a role in the stronger organization of the sib and clan,[3] although in many instances the common line of descent became fictitious. The same applies to the more prominent political organization of the tribe.[4] The sociologist Münch says that what "we call 'primitive societies' are societies in which action approaches to a higher degree than in any other society, the model of action taking place only within the boundaries of a closed community" (Münch 1990:448).

A shared characterization of these three forms of early human societies is found in the fact that they are all instances of an undifferentiated society in the above-mentioned sense of Kammler. Social entities that eventually, through a long process of societal differentiation, emerged as relatively independent units functioning within their own distinct social orbits, such as business enterprises, social clubs, cultural associations, schools and universities, religious denominations, and so on, within undifferentiated societies are still absorbed within an encompassing whole. This does not mean that similar activities did not take place within undifferentiated societies, but merely entails that the undifferentiated totality as such alternatively acts as a

---

2 Van Creveld mentions the Australian aborigines, the Eskimo of Alaska, Canada and Greenland and the Kalahari Bushmen (Van Creveld 1999:2).

3 Lowie points out, in opposition to Morgan's school, that instead of a dull uniformity primitive society exhibits "mottled diversity; instead of the single sib pattern multiplied in fulsome profusion we detect a variety of social units" (Lowie 1921:414).

4 Somewhat larger communities with a slightly more sophisticated political organization, according to Van Creveld, are found in "some East African Nilotic tribes such as the Anuak, Dinka, Masai, and Nuer" as well as "the inhabitants of the New Guinea highlands and Micronesia; and most – though not all – pre-Columbian Amerindian tribes in North and South America" (Van Creveld 1999:2).

political unity, as a business enterprise or as a cultic entity. Yet, unlike what is found within a differentiated society, all these activities are bound by one undifferentiated form of organization. It is only within a differentiated society that distinct societal collectivities operate on the basis of their own form of organization.

Since it seems as if the individual human being is fully embraced by undifferentiated societies one may obtain the impression that in the case of a differentiated society space is opened up for the freedom of the individual. Yet the opposition of individual and society highlights the existence of a fundamental theoretical problem that is closely connected to alternative and even conflicting views on human society.

A prominent German sociologist of the early 20th century, Othmar Spann, prefers to capture this opposition as one between individualism and universalism (cf. Spann 1930:66 ff., 97 ff. and Siegfried 1974: 51). Another way to designate it is to refer to atomism and holism (or: collectivism – see O'Neill 1973). According to the atomistic (individualistic) view, society is ultimately explicable in terms of the interaction of (autonomous) individuals, whereas holism (universalism) postulates some or other social entity to be the highest and all-encompassing whole of society – such that every other social entity stands in the relation of a part to this larger whole.[5]

The shortcoming present in both atomistic and holistic views of society is that they attempt to enclose the existence of a person either in the abstracted nature of being an individual or by sealing it off within some or other societal collectivity – such as the nation, the state, or the church – elevated to being the all-encompassing whole of society. What is not realized by these views is (i) that the social dimension of reality is constitutive for being human and (ii) that no single social entity embraces the life of a person fully.

Regarding (i): Human beings cannot be captured by the fiction of a pre-state condition in the sense that only after entering into a hypothetical social contract they start to participate in social relations. The existence of every human being is co-conditioned by multiple possibilities, including functioning within diverse social relationships. Therefore one cannot introduce in a secondary sense what is given as a primary condition for being human.

Regarding (ii): Although the capacity to function in diverse social contexts is intrinsic to human existence this does not entail that being human could be exclusively characterized by its social functioning, simply because other dimensions of functioning are equally intrinsic to being human. Scholarly reflection on the nature of being human explored many alternative options, such as typifying the human

[5] In his critical rejection of the holistic concept of a totality (*Ganzheit*) Habermas refers to the individuals as being incorporated (*eingegliedert*) in a societal whole (*gesellschaftlichen Ganzen*) (see Habermas 1998:65).

person as a rational-ethical being, as a social being, as an economic being (*homo economicus*), in terms of symbolism (*homo symbolicus*) and so on. Yet every one of these attempts merely lifts out one or a couple of functional possibilities entailed in being human without adequately accounting for the fact that a person concurrently (at once) function within all these aspectual dimensions without being absorbed by any one of them. Likewise, the human person can assume multiple social roles within human society without ever being exhausted by any one of them.

The complexity (and perhaps: mystery) of being human is that it transcends the confines of just being an individual – just as being human transcends the spheres of operation of distinct social entities. This uniquely human transcendence precludes every attempt to characterize or qualify being human merely in terms of one functional quality or in terms of participating within one societal collectivity. Consequently, acknowledging this fundamental transcendence precludes opting for either an atomistic or a holistic view of society.[6]

However, both within the more recent developments of system theory within the discipline of sociology and within the domain of political theory crucial and important starting points are found for an alternative understanding of human society.

Once the untenable bias of an atomistic or holistic approach to society is rejected it becomes possible to appreciate diverse societal institutions and collectivities in terms of their own intrinsic natures, in terms of their own distinct spheres of operation. What is particularly striking in this regard is that the atomist-holist (individualist-universalist) dilemma held sway for the larger part of the past 2000 years. Perhaps the first scholar who effectively questioned the whole-parts scheme inherent in universalist theories of society was the German legal scholar Johannes Althusius. He realized that not every societal entity (such as families, churches, etc.) is a part of the state – true parts are solely provinces and municipalities (see Althusius 1603:16). This insight was accompanied by a clear understanding of the inner structural principles governing distinct societal collectivities – Althusius holds that there are proper laws (*leges propriae*) according to which "particular associations are ruled", required by their nature (Althusius as translated in Carney 1965:16). Two 19th century Dutch politicians explored this idea further by designating it as sphere-sovereignty (Groen van Prinsterer and Abraham Kuyper), reminding one immediately of Walzer's "spheres of justice" (see Kuyper 1880 and Walzer 1983).

The revival of Parsons's structural-functional approach to society in the neofunctionalism of Alexander gave birth to an equally significant emphasis on the "own inner laws" of differentiated societal spheres of life. Münch in particular points out that the starting point of the theoretical debate of the 1980s is found in

[6] The complex issue concerning the relationship between "individual" and "society" is analyzed in detail in four consecutive and mutually cohering articles – see Strauss 2002, 2004, 2006 and 2007. In these articles it is shown that (sociological) system theory actually adheres to a holistic view of society and as an effect cannot account for the intrinsic nature of distinct societal entities.

"Weber's theory of rationalization of modern society into spheres that are guided to an increasing extent by their own inner laws" (Münch 1990:442). In particular he mentions the "political system" with "its own inner laws" (Münch 1990:444). Similar points of connection for the acknowledgement of the sphere-sovereignty of social entities are present in the political philosophy of John Rawls.[7] In spite of the fact that his thought is torn apart by atomistic and holistic tendencies he does succeed in transcending this opposition when he shows a sensitivity for different principles for distinct kinds of subjects: "But it is the distinct purposes and roles of the parts of the social structure, and how they fit together, that explains there being different principles for distinct kinds of subjects" (Rawls 1996:262). When he continues on the same page by mentioning the distinctive autonomy of elements of society where principles within their own sphere fit their peculiar nature, his entire mode of formulation approximates the idea of sphere-sovereignty: "Indeed, it seems natural to suppose that the distinctive character and autonomy of the various elements of society requires that, within some sphere, they act from their own principles designed to fit their peculiar nature!"

In his discussion of issues of globalization Habermas refers to the "classical doctrine of the state" and then mentions private spheres of life: "(T)he state maintains law and order within the borders of its own territory and guarantees security for citizens within their own private spheres of life" (Habermas 2001:81). On the next page he speaks of "differentiated forms of life". In his extensive work on communicative actions he also explicitly speaks of the "own laws" of "specific social spheres".[8]

Someone like Dunleavy (Dunleavy and O'Leary 1987:320) approaches the nature of the state by distinguishing between the following subdivision of the "non-state" domain: the "state and civil society" on the one hand and the "state and the individual" on the other. From Aristotle up to Kant the idea of a civil society was actually identified with the state (see Riedel 1976:88). It was only after Hegel posited his own (historically non-sensitive) account of "civil society" (in his *Philosophie des Rechts*, § 182) that the distinction between state and civil society became familiar. However, for the purposes of our present discussion we solely focus on the diverse social entities found in a differentiated society.

These perspectives implicitly underscore the structural difference between the state on the one hand and the various non-political spheres of life on the other – an insight that will help us to understand why it is problematic to speak of "democratic societies". Before we can argue why this is the case we first have to return to the adjective "democratic".

---

7 Talisse quotes Nagel who claims that John Rawls is the "most important political philosopher of the twentieth century" (see Talisse 2001:5).

8 "den sogenannten Eigengesetzlichkeiten einzelner sozialer Sphären" (Habermas 1995-2:437).

3. DEMOCRACY

It is customary to address the question concerning the nature of democracy by giving an etymological explanation, according to which it indicates the (ruling) power (*kratia*) of the people (*demos*). The fact that this explanation makes an appeal to original Greek terms may generate the (mistaken) impression that ancient Greece already knew the state. Yet Plato's major work has the title *Politeia* because the Greek *polis* (city-state) served as its point of orientation. Greek and medieval culture only knew empires and kingdoms. Jellinek informs us that it was only during the 16th and 17th centuries that the term "state" appeared in French, English and German (see Jellinek 1966:132-135). By the end of the 18th and the beginning of the 19th century the traditional term "republic" started to be equated with the term "state". According to Wager, the state concept rests on two distinct meanings, the one related to the Ruler and the other to the Body Politic. In connection with the former he mentions words such as *status*, *stato*, *estado* – all associated with the personal status of the governor (*status regalis*, *regis*, *ducalis*, *ducis*, *principis*), while the body politic is related to the constitution of such a body politic (here *status* means *species*, *forma politicae, reipublicae*).[9]

In the course of the 19th century the modern state emerged in the major European countries. In his discussion of the state as ideal Van Creveld directly relates the "great transformation" of the period between 1789 and 1945 to the political theory of Rousseau (Van Creveld 1999:191ff.). Although Cunningham (2002) provides a fairly accurate explanation of the basic tenets of Rousseau's political philosophy against the background of Hobbes's totalitarian theory, he does not sufficiently account for the crucial continuity in the conceptions of these two thinkers. In his *Leviathan* Hobbes explicitly opts for a view in which the monarch obtained an absolute power or competency – through the contract everyone surrendered by giving up the right to complain about injustice. He does not assign sovereignty to the people itself, for only the unity of the people, as represented in the ruler, is sovereign. Through the contract, that person actually willed what the majority "ordayned": "And therefore if he refuses to stand thereto, or make Protestation against any of their Decrees, he does contrary to his Covenant and therefore unjustly" (Hobbes 1968:231-232). The will of the sovereign is considered to be the own will of each citizen.

Surely Rousseau creates the impression that through the social contract he wants to advocate a condition in which (public) freedom and equality prevail. He starts with the requirement of unanimity but then in a subtle way switches from the multiplicity of individual human beings to the collective whole emerging from the

[9] Wager designates these two by employing the phrases *status regalis* and *species politicae* (cf. Wagner 1968:416; also see Strauss 2006b).

contract – receiving from this act its identity, life and will.[10] Although Cunningham mentions this outcome of the contract he does not link it to two other crucial views of Rousseau (see Cunningham 2002:124 ff.) but merely fairly superficially discusses the famous claim of Rousseau that those who disagree with the general will must be "forced to be free" (Cunningham 2002:131 ff.). The first view concerns Rousseau's conception of freedom in terms of autonomy: "(f)reedom is obedience to a law which we prescribe to ourselves" (Rousseau 1975:247). He combines the mentioned ideal of autonomy with the supposition that the general will is supposed to be the own will of every citizen. Therefore it should not be surprising that he considers the general will to be infallible – it is always correct (Rousseau 1975:252).

Rousseau's view of freedom must be seen in its relation to the subtle shift from an atomistic (individualistic) starting point of the contract and its holistic (universalistic) result. For that reason the former independent and autonomous existence gives way to a collective entity embracing every individual as an indivisible part of the whole (*partie indivisible du tout* – 1975:244). This new totality is also designated as the *volonté générale* (the general will). Add to this his conviction that "the state, with regard to its members, is master of all their goods through the social contract" (Rousseau 1975:347). In other words, the contract endows the general will with an absolute competency over all its members (the original individuals transformed into indivisible parts of the whole):

> "Just as nature gives to every human being an absolute power over all its members, so the social contract endows the body politic with an absolute power over all its members; and it is this power which, directed by the general will, as I have said, bears the name of sovereignty" (Rousseau 1975:253).

Rousseau's aim to provide equal benefit to everyone participating in the post-contractual state entails that the general will should never be directed towards particular interests – it has to pursue the public benefit. It may nevertheless happen that the people are misled, although, as such, the body politic is never corrupt.[11] Consequently, those minorities who pursue particular interests are actually acting against their own will – as indivisible parts of the general will – and since we are only free when we are obedient to the law which we have prescribed to ourselves

[10] "Immediately the association produces, in the place of the particular person of every participant, a moral and collective body, composed out of just as many members as the voices of the gathering, which derives from this act its unity, communal self, life and will" (Rousseau 1975:244).

[11] For Rousseau the human will is always focused on its self-interest, even when it is true that we are not always able to realize what this is. This implies that all members of the body politic will not necessarily agree. Consequently, at this point, Rousseau has to fall back on the majority principle. This principle presupposes that at least once – that is, with the erection of the initial social contract – unanimity should be present (Rousseau 1975:243, cf. 250 notes 1, 254, 310).

such people will be forced to be obedient and therefore free: "... ce qui ne signifie autre chose sinon qu'on le forcera à être libre" (Rousseau 1975:246)![12]

Cunningham did not realize that in the final analysis Rousseau's revolutionary democratic construction of freedom inevitably ends with totalitarian and absolutistic (*machtstaat* = power state) consequences. If law flows from the general will that can only come to expression within the state, then in principle all forms of law within a differentiated society are absorbed by the state – thus leaving no room for the intrinsic legal sphere of any non-political societal collectivity. In other words, the internal law of every societal form of life distinct from the state – such as the internal law of the school, the firm, marriage, the family, the social club, the church, and so on – is sacrificed to the general will. The conception of the state advanced by Rousseau does not contain any safeguard for any one of these legal domains that are distinct from that of the state. To him law remains state law.[13] For example, Rousseau advocates a civil religion (*la religion civile*) with dogmas determined by the sovereign. In this respect, he is just as intolerant as the churches of his time: "Though it cannot compel anyone to believe them, it can dispel from the state everyone not believing them" (Rousseau 1975:334-335).

The tragic irony of Rousseau's political theory is that its outcome in principle does not differ from that of Hobbes – what the latter said about the monarch the former said about the general will! In other words, although it appears as if Rousseau wants to safeguard an understanding of public legal freedom and equality, the universalistic (holistic) outcome of the social contract irrevocably terminates in a power state theory leaving no room for the internal spheres of competence of the non-political domains of a differentiated society. We shall argue below that although the use of the phrase "democratic society" may give the impression of an acknowledgement of spheres of freedom, it in fact harbours totalitarian consequences.

Given the pervasive influence of Rousseau's idea of popular sovereignty we have to highlight yet another impasse in his thought, because this issue continues to accompany diverse views on the nature of democracy. The holistic whole-parts scheme present in Rousseau's understanding of the sovereign actually replaces the relation of super- and subordination present between government and subject (the citizens). Already Montesquieu struggled with the ambiguity entailed in the idea of popular sovereignty, for he states that within a democracy the people in a certain respect is the monarch and in another the subject.[14] Rousseau likewise realized that the people can only be either the sovereign or the subject (Rousseau 1975:305).

---

12 "This means nothing less than that such a person would be forced to be free."

13 This is also the all-pervasive principle found in the Declaration of the *Rights of man and the citizen* of the French Revolution (1789), for section 6 reads: "Law is an expression of the General Will."

14 Cf. Book II, Chapter 2 of his work on the *Spirit of law* – see the translation contained in Bierens de Haan and Bodlaender (1947:319-320): "In de democratie is het volk dus in zeker opsicht de monarch, in ander opzicht de onderdaan."

Cunningham correctly points out that within the body politic created by the contract "governed and governors are identical" (Cunningham 2002:127). Rousseau holds: "[T]he essence of the body politic is given in the reconciliation of obedience and freedom, and the words subject and sovereign are the identical correlates united in the single word citizen" (Rousseau 1975:299).

It is therefore not surprising that Habermas as a social philosopher employs a view of democracy in which the emphasis on free and equal members of a legal association is prominent (see Habermas 1998:141). He holds that alongside a system of rights a language must be created in which people can understand themselves as a community of freely associated free and equal legal partners (Habermas 1998:143). His assumption is that the principle of democracy not only has to determine a legitimate procedure of positing law, since it also has to guide the bringing forth of the jural medium itself (Habermas 1998:142-143). What is absent in Habermas's view is an account of the legal authority and jural competence entailed in the office of government, for the latter irrevocably implies a relation of super- and subordination between government and subject. Implicitly Harbermas derives this relation from the self-organization of a legal community of free and equal legal partners (*Rechtsgenossen*), that is to say by implication he attempts to square the circle by deriving the relation of super- and subordination from the equality between free *Rechtsgenossen*.[15]

Against this background we can now proceed to a discussion of the question:

4. WHAT IS PROBLEMATIC ABOUT THE NOTION OF A "DEMOCRATIC SOCIETY"?

Since the noun "democracy" is meant to attach to the idea of the state its expanded application to "society" implicitly elevates the state to function as the encompassing whole of society. The subtle switch from a "democratic state" to a "democratic society" is therefore more significant than it may appear at first sight. Ultimately it reveals a lack of a proper appreciation of the distinctness and uniqueness of the non-political institutions and collectivities of a differentiated society. The practice of speaking of democratic societies is truly widespread in contemporary political theory. We merely have to consider how frequently this phrase appears in some of the

[15] The idea of autonomy that pervaded the modern world since the Renaissance at most allows for equality but not for any form of super- and subordination. In his portrayal of the freedom prevailing in the state of nature John Locke employs the significant phrase, "for all being kings as much as he, every man his equal" (see Locke 1690:179; Chapter IX, § 123). According to the sociologist Von Wiese, the social sciences frequently have to trace their problems back to the "last abstraction" that is given in the "relationship of the one to the many" (Von Wiese 1959:19). This view underlies his claim that the "next-to-each-other" of people is the most fundamental trait of the social and that the vertical structuring can never serve as the basis for sociological analysis (Von Wiese 1959:76-77).

works of a thinker assessed, as noted above, to be the foremost political philosopher of the 20th century – John Rawls.[16]

It is quite normal to relate the notion of democracy to the nature of power because the (democratic) majority is at once supposed to be the source of political power. Unfortunately contemporary discussions of (political) power largely bypass one of the most basic issues in legal philosophy, namely that regarding a theory of the sources of law.[17] Although a proper understanding of this issue transcends the scope of this article a few brief remarks will suffice.

The (consensus) approach of the sociologist Parsons, with his employment of the whole-parts relation (systems and subsystems), also attempts to avoid relations of super- and subordination in respect of power.[18] According to him, the issue is not super-power over others but the "capacity of a social system to get things done in its collective interest" (Parsons 1969:205). Within the tradition of a conflict approach Dahl, by contrast, emphasizes that according to him power entails an element of conflict.[19] His well-known definition of power focuses on the fact that the power of one person over another person is manifest when one person can get another person to do something that that person otherwise would not have done.[20] This definition covers too much for even in the case of co-ordinational relationships, i.e. relations on equal footing without any super- and subordination, a polite response to a kind request may cause a person to do something that that person otherwise would not have done. In addition it completely ignores the elements of competency and legitimacy attached to the function of a government in office. Within the context of state law a competent organ is required in order to make valid law (i.e., in order to positivize legal principles). Our assumption is that legal principles are supra-individual and non-arbitrary – a view questioning all forms of the idea of individual autonomy, for the latter never succeeds in bridging the gap between the will of an individual

16 For example, the phrase "democratic society" appears on the following pages of Rawls's work *Political liberalism* and the revised edition of his *A theory of justice*: See Rawls 1996:10, 13, 15, 24-25, 30, 33, 36, 38, 40-43, 61, 65, 70, 79, 90, 95, 134, 136, 154, 175, 177, 198, 205-206, 214, 221, 223, 243, 292, 303, 307, 320, 335, 344, 346, 369, 376, 387, 390, 414, 418, 424, 432; and Rawls 1999:249, 280, 320, 326, 335.

17 The correlate of the concept of the sources of law is given in the accompanying competencies embedded in the applicable offices occupied by office-bearers capable of forming law within a limited sphere of law.

18 Power should be understood in the sense of a normative calling, allowing for norm-conformative and antinormative usages of power. By contrast Morriss considers power to be an a-normative, purely descriptive term (Morriss 1980:199).

19 In a different context I have argued extensively why the conflict-theoretical tradition confuses the cultural calling entailed in power and all forms of an abuse of power (see Strauss 2006a:207 ff., 216 ff.)

20 Dahl's initial article on "The concept of power" appeared in the journal *Behavioural Science* 2(1957). It was reprinted in the work edited by Roderick Bell (Edwards and Wagner) in 1969 (see Bell, Edwards and Wagner 1969:80).

and what is supposed to apply to all individuals alike.[21] A more detailed argument is needed to show that the validity of law only makes sense when pre-positive jural principles are acknowledged that are both universal and constant, making possible the changing positive shapes and forms in which they are made valid.

Natural law saw something of the underlying (universal, constant) structure of our legal experience, but it distorted its meaning by assuming that those underlying principles already have been made valid (enforced) for all times and all places. Yet no principle in this fundamental ontic sense is valid *per se*. Every principle requires human intervention in order to be made valid, i.e. no (pre-positive) ontic principle holds by and of itself. Only human beings are able to "enforce" them (as Derrida correctly emphasizes – Derrida 2002:233 ff.), and only human beings can give a positive form or shape to them. The activity of giving form to underlying principles is sometimes designated as acts of positivizing, and the result of such acts is accordingly known as positivizations. Habermas explicitly uses this term, for example when he speaks of "the positivization of law" (Habermas 1996:71 and 1998:101, 173, 180). Already in 1930 the word "Positivierung" was used by Smend (see Smend 1930:98).[22]

Within a differentiated society there are multiple instances where relations of super- and subordination prevail, i.e. situations where office-bearers have power over other persons. On a more general level the basic distinction involved here is that between power over things and power over persons. This distinction concerns subject-object relations and subject-subject relations. In the latter case the meaning of an office is implied, because power over persons, such as that of a government over citizens, requires a competent organ occupying a (legitimate) office. The idea of office, furthermore, entails a limited sphere of competence and therefore by definition opposes any totalitarian view aiming at embracing society as a whole.

The constitution of modern states serves as the originating source of distinct original legal spheres of competence. In spite of the fact that it is a formal source of law, the constitution contains stipulations pertaining to (materially) different legal spheres – such as the domain of civil private law (common law – compare human rights), constitutional law (compare the procedure specified for putting a government in office on the basis of an election procedure) and so on. The most important trait of the role of the modern state within a differentiated society is given in its limited

[21] When Dupont and Wood give an assessment of the future of "democracy" they mention the juxtapositioning of the (collective) "public good" and the "moral individual" by Held. According to the latter, "the ultimate units of moral concern are individual people, not states or other particular forms of human association" (see Wood and Dupont 2006:248).

[22] Nicolai Hartmann also employs the idea of positivizing (*Positivierung*): "Dagegen ist hier wichtig, daß den Werten die Tendenz zur Realisierung immanent ist" (Hartmann 1926:154 ff.). "Soll aber ein Wert realisiert, ein Ziel erreicht werden können, so muß das Ziel zunächst erkannt und als solches gesetzt werden. D.h., daß der Wert zunächst positiviert werden muß" (Hartmann 1926:160 ff.; see Horneffer 1933:105).

legal competence, leaving open legal spheres distinct from the domain of public law[23] and in the fact that it is the only institution that integrates the multiplicity of legal interests on its territory in one public legal order. The public legal order of the state is a typical *ius commune* that cuts across all the other societal ties of its citizens. The internal legal sphere of every non-political societal collectivity is always bound to a particular private concern and therefore constitutes at most a *ius specificum* (a specific law belonging to the domain of non-civil private law).

When the rights and freedoms of citizens are guaranteed within the domain of public law, civil private law and non-civil private law, then such a state may be characterized as a *Rechtsstaat* (in German, Dutch and Afrikaans). Although the term *Rechtsstaat* is normally translated as "a constitutional state under the rule of law", one may also opt for an alternative concise phrase by designating it as a "just state". Although this phrase is not generally used, both Rawls (1999:333, 337) and Dworkin (2004:376) do employ it.

It must be clear that the idea of a just state is much more encompassing than what is intended by the expression "democratic state". In fact the constitutions of modern states always stipulate in which way, through which process, a government is put into the office of government. Whatever type of electoral system is used the role of universal suffrage is to put a government in office on the basis of what became known as fair and free elections. It is to this restricted, subservient but indeed very important element of constitutional law that the term "democracy" refers. Yet putting a government in office[24] does not settle any issue involved in the actual governing task of a government. The entire judicial system of a just state proceeds in accordance with the typical jural principle guiding constitutional law, administrative law, criminal law and criminal procedure – and in none of these legal domains is it the case that the majority of citizens exercise their "democratic" vote. If a person is found guilty of murder beyond any reasonable doubt (after a due process in a criminal court) it will be absurd to subject the validity of this judicial decision to a majority vote of all the citizens.

The implication is clear: amongst all the public legal freedoms – such as the right to attend and organize political gatherings, the right to organize freely within the domain of public interaction, to express political opinions, the right to establish public media, the right to criticize, and the right to protest – the capstone of our public freedoms is given in the active and passive right to vote and to be elected.

---

23 The domain of public law embraces constitutional law, administrative law, international public law (the "law of nations"), penal law and the law of criminal procedure.

24 Since a constitution merely stipulates that when a political party gained the majority of votes at the polls it can put the government in office, it never means that the party itself rules in the state – the party is never a state organ; it remains an organization distinct from the state. Strictly speaking it is therefore a mistake to say that some or other party governs.

The adjective "democratic" solely captures this competence of the public-legal co-determination and co-responsibility of the citizenry.

Unfortunately the adjective "democratic" acquired a new life in its use as a noun for in this case the state itself was identified with the substantive "democracy" and subsequently it was combined with a whole array of different adjectives. Just contemplate composite phrases such as direct democracy, representative democracy, social democracy, consociational democracy, liberal democracy, deliberative democracy and so on.

Our argument has been that the adjective "democratic" has a very limited scope for it merely refers to a restricted element of constitutional law. Therefore, instead of speaking of a "democratic state" we proposed that it is preferable to use an adjective with a much wider scope, namely the phrase "just state". This phrase not only captures an acknowledgement of the domain of public legal freedoms, but also those of civil private law (civil freedoms) and the non-civil private law (societal freedoms). At once the idea of a just state also avoids the problematic idea of popular sovereignty (majority rule)[25] with its implied confusion of the relationship between government and subjects – the government is relegated to become the servant of the true sovereign, the "people". Thus the authority structure of the state, its inherent relation of super- and subordination, is turned upside down.

Once this relation of "above" and "below" has been restored it is important to keep in mind that governance within a just state always rests on a jur(idic)ally delimited legal power (competence, attached to an office). On the one hand it accounts for the formation of positive law through competent state organs and on the other it precludes interference within the internal domain of freedom (jural spheres) of non-state social collectivities.

> At this point we may provisionally summarize the position argued for above: The adjective "democratic" turned out to have a much more modest domain of application, merely restricted to the election process as stipulated in die constitution of a just state. The constitutionally granted competence of citizens to decide through their vote who will occupy the office of government presupposes this office with its inherent public legal competencies destined to integrate the multiplicity of legal interests within the territory of the state into one public legal order in such a way that whenever an infringement occurs the government is entitled to harmonize and balance these interests in a truly retributive sense. The real concern of the government in office within a just state is therefore to maintain a public legal order in which political freedoms, civil freedoms and societal freedoms are guaranteed.

[25] Cunningham strikingly discusses the issue of the "tyranny of the majority" (Cunningham 2002:119 ff.) and "majority tyranny" (Cunningham 2002:134 ff.).

Yet none of the non-political social collectivities and institutions within a differentiated society is democratic in the sense in which this adjective is applicable to the state. We conclude by providing some additional arguments against the idea of a democratic society by briefly looking at some of the societal collectivities distinct from the state and by a succinct reference to the new South African "democracy" since 1994.

5. DEMOCRACY AND NON-POLITICAL SOCIETAL COLLECTIVITIES

Both in the publications of those writing on South African politics and in the everyday parlance within the domain of the public opinion the expression "democratic society" has established a firm foothold. The implicit but widespread totalitarian implications of this mode of speech can be tested by two basic questions, such as: (i) who is responsible for the order within society and (ii) are schools, universities, business enterprises, sport clubs, churches and families parts of the state?

Over many years of teaching political theory and political philosophy (on undergraduate and postgraduate levels) I have always posed these two questions in the opening lecture of the course. The large majority of students responded by claiming that the state is responsible for the order within society and that schools, universities, business enterprises, sport clubs, churches and families are indeed parts of the state.

Regarding the first point one can contemplate various subsequent questions in order to demonstrate what is mistaken in the idea that the state is responsible for the order within society. For example, does the state organize churches in the sense of having the competence to formulate their internal church order? Clearly this is not the case, because ecclesiastical law belongs to the inner structure of the church, to its own sphere of operation within the domain of non-civil private law. The point to be observed is that, according to its typical task, the state can only take responsibility for a specific kind of order, namely a legal order in the sense of the public legal order of a state.

The second question should be negated as well because none of the social entities mentioned are parts of the state – unless the state is conceived in a holistic, totalitarian fashion. (Fortunately those students who initially affirmed that they are parts of the state eventually reverted their position by conceding that only provinces and municipalities are genuine parts of the state.)

Maré refers to Laclau who believes that we should "recognize a multitude of subject positions such as ethnic groups, women, religious groups and so on, each with their own, at times incompatible, demands and calls on social rights and for participation" (Maré 2001:86). Clearly this mode of speech reveals that Maré does

not realize that state-membership (i.e. being a citizen) requires that one abstracts from all such non-political ties (ethnic, religious and so on) in order to legally take care of the legal interests entailed in them. But the moment non-political entities are considered to "participate" they are turned into parts of the state. Therefore it should not surprise us that Laclau advocates an idea of society in which "democracy" is viewed as more encompassing than anyone of these partial societal ties: "'Democracy' is a strong contender as a universal, to provide hegemony for particular struggles, a 'sense of belonging to a community larger than each of the particular groups in question'" (Maré 2001:86).

As could be expected, this more encompassing view of the state is fed by the concept of a "democratic society" – and at the same time it has to wrestle with the "inclusion of spheres other than the political" (Maré 2001:87): "A democratic society has to tread the fine line between 'diversity' (diversification) and 'difference' (differentiation). In South Africa we have, to date, been much more successful in reinforcing difference than in creating a flexibility of identification. The way to a society, within which democracy provides the always-unattainable, yet none the less cohesion-providing, universal, remains dangerously elusive unless *non*-racialism is addressed" (Maré 2001:97-98). Note, in connection with the theme of this article, that a "democratic society," while coping with the distinctness of diversity and difference, as a democracy it serves as a "cohesion-providing, universal" (Maré 2001:99) – when the state serves as the encompassing whole ("universal") of society the latter must be "comocratic". The dilemma of diversity and difference receives its peculiar dialectical implementation in the practice of "transformation" and "affirmative action" – for our new Constitution on the one hand underwrites non-discrimination and on the other hand legitimizes "fair discrimination" (see Maré 2003:40 ff.). In order to side-step this, dialectical split transformation and fair discrimination ought to be positioned within the context of a distinction between constitutive and regulative legal principles – where equal treatment and non-discrimination belongs to the constitutive structure of the legal order and transformation and equity to its regulative structure.[26] It is therefore not surprising that the close entanglement of state and party within contemporary South Africa causes Giliomee, Myburgh and Schlemmer to accuse the ANC that since 1994 it "misused its position as a democratically elected government to extend its domination over state *and society*" (the italics are mine – DFMS) (see Maré 2003:56).[27]

Particularly within Africa the borderline between "democracy" and a totalitarian regime impinging upon the *bona fide* internal freedom of non-political social entities

[26] The fact that the constitution collapses into an internally contradictory document when regulative principles are treated as if they are constitutive (in which case they at once become permanent) is argued in Strauss, 2006c and Strauss, 2008.

[27] Phrases such as "a Leninist strategy of democratic centralism" and "African despotism" are employed (see Maré 2003:57).

is very thin. Although "democratically" elected it all too frequently happens that the elected head of state reverts to a classical monarchical position, acting as if he is the "King" – and "a King can do no wrong". The most recent course of events in Zimbabwe just underscores this observation.

The use of the expression "democratic societies" without any further reflection enhances an understanding of human affairs in terms that level the structural principles governing the various societal collectivities found in a differentiated society and thus paves the way for an uncritical acceptance of totalitarian state practices. What is traditionally designated as our democratic legacy – what we transformed into the idea of a just state – can only be safeguarded (also within South Africa) when more than lip service is paid to the acknowledgment of the inherent limits of governmental authority and to the importance of leaving intact the full scope of civil and non-civil private law within a differentiated society.

For this reason our general discussion of the notion of "society" highlighted the fact that prominent contemporary thinkers indeed reveal an intuitive awareness of the uniqueness and own inner laws of distinct societal spheres within a differentiated society. The implication of this intuitive insight is that the structural type of each kind of societal collectivity evinces something peculiar, something underlying its uniqueness. Consequently the forms of co-responsibility and co-determination present in a business firm, a local congregation, a university, a sports club and even within the nuclear family are all different from what is found in the state. Within the context of the state the adjectival meaning of the term "democratic" contains the idea of a majority decision – as stipulated by the applicable constitution. But we noted that not even within the normal functioning of a government – in fulfilling its public legal task of balancing and harmonizing a multiplicity of legal interests – is it possible to take recourse to the majority principle in an unqualified way.

The reason why the majority principle has a very precise and restricted constitutional place within the state is straightforward: the majority is never the source of what is just (or true). Every attempt to attribute these qualities to the majority terminates in a self-defeating *regressus in infinitum*: did the majority decide that what the majority decides is just (or true)? And: did the majority decide *that* the majority decides that *what* the majority decides is just (or true)? …

Just as little as it is possible to settle matters of justice through a majority vote is it possible to settle matters of truth through such a vote. For example, there was a stage in modern history in which the majority of people thought that the surface of the earth is flat – but this majority stance did not change the spherical nature of the earth at all! Scholarly disciplines do not function of the basis of "majority rule" – it is only within the institutionalization of science and scholarship – in universities – that a form of organization emerges in which there are elements of academic co-determination and co-responsibility. But this never implies that students obtain the competence to appoint

their academic teachers! The presupposition of the teaching situation within academic institutions is that there are learned people and that there are learners – an academic relation of super- and subordination. Tests and examinations are conducted by competent scholars appointed in the office of teachers – and no "democratic vote" can turn things upside down, transforming the learners into the sovereign academic authority with the teachers as their subjected servants.

Within church denominations one also does not find anything "democratic" comparable to what is present within a just state. Church denominations split on the basis of incompatible confessions of faith. Whereas a just state enables the existence of alternative political parties – each with its own political confession of faith – a similar situation within the church would immediately lead to charges of heresy, simply because the church by its nature as a community of faith can only opt for one confession of faith.

In the case of the nuclear family (father, mother and children) "democracy" is plainly absurd for it would entail that there were kids before the (to-be-elected) parents!

Of course voluntary associations, such as sports clubs, do show important similarities with the structure of co-determination and co-responsibility operative within a just state, but given the fact that they form part of non-civil private law (restricted only to those who are members of this *ius privatum*) precludes an identification with the democratic process within the state (state law and citizenship cut across all non-political ties citizens may have – explaining its true character as a universal *ius commune*).

By and large the non-political spheres of a differentiated society therefore cannot meaningfully be characterized as democratic. The most important reason why contemporary political theorists still continue to speak of democratic societies is that they implicitly elevate the state to the level of an encompassing whole, embracing all dimensions of a differentiated society as its integral parts. The common practice to refer to democratic societies therefore actually contains an implicit totalitarian understanding of the state.

The impasse in this mode of speech can only be transcended if the idea of structurally different societal collectivities is taken seriously – each with its own "inner laws" (sphere-sovereignty). Although we mentioned that an acknowledgement of this idea surfaced in the thought of prominent contemporary scholars (such as Rawls, Habermas and Münch), it should be noted that this promising intuition does call for a more detailed and well-founded analysis of the distinct nature of all the entities of a differentiated society. But analyzing the shortcomings in the approaches of the mentioned scholars once again exceeds the scope of our present discussion.

6. CONCLUSION

The uniqueness of every social entity discernable within a differentiated society precludes portraying any one of them as an image of the state with its structurally delimited democratic procedure of putting a government in office. It is only when

the unwarranted jump is made to an implicitly totalitarian and absolutistic view of the state that one can speak of "democratic societies". Yet no single non-political social entity replicates the structural principle of the state and consequently it is best not to speak of democratic societies at all.

LITERATURE

Alexander JC 1990. *Differentiation theory and social change* (Co-editor: Paul Colomy). New York: Columbia University Press.

Althusius J (1603). *Politica methodice digesta* [Collection of systematic political views] (1603, 3rd edition 1614), The politics of Johannes Althusius; an abridged translation of the 3rd ed. of *Politica methodice digesta*, Atque exemplis sacris et Profanis illustrata / Althusius, Johannes; translated, with an introduction by Frederick S Carney 1965. London: Eyre and Spottiswoode. See also the complete translation: Althusius J 1979. *Politica methodice digesta of Johannes Althusius* (Althaus), with an introduction by Carl Joachim Friedrich. New York: Arno Press.

Bell R, Edwards DV and Wagner RH 1969. *Political power*: *a reader in theory and research*. New York: Free Press.

Bierens de Haan JD and Bodlaender ML 1947. *Politeia*, g*roote mannen over staat en maatschappij*, *Van Plato tot Kant*. Amsterdam-London: Elsevier.

Böckenförde E-W (ed.) 1976. *Staat und Gesellschaft. Wege der Forschung CDLXXI*. Darmstadt: Wissenschaftliche Buchgesellschaft.

Burley J (ed.) 2004. *Dworkin and his critics*. Oxford: Blackwell Publishing.

Carney FS 1965. *The politics of Johannes Althusius*; an abridged tr. of the 3rd edition of *Politica methodice digesta* [Collection of Systematic Political Views], with an introduction by Frederick S Carney. London: Eyre and Spottiswoode.

Cunningham F 2002. *Theories of democracy*. London: Routledge.

Dahl R 1969. "The concept of power." In Bell, Edwards and Wagner 1969.

Daniel *et al*. *State of the Nation, South Africa 2003-2004*. Cape Town: HSRC Press.

Derrida J 2002. "Force of law, the 'mystical foundation of authority'." In *Acts of religion*. Edited and with an introduction by Gil Anidjar, New York: Routledge.

Dunleavy P and O'Leary B 1987. *Theories of the state*. *The politics of liberal democracy*. London: MacMillan Education Ltd.

Dworkin R 2004. "Replies to critics." In Burley 2004: 337-395.

Freeman M and Robertson D 1980. *The frontiers of political theory*. Sussex: The Harvester Press.

Habermas J 1995-1 & 1995-2. *Theorie des kommunikativen Handelns*. [Theory of Communicative Action] 1 and 2. Frankfurt am Main: Suhrkamp Verlag (Fourth revised edition, 1987 – "Taschenbuch" edition 1995 – originally published in 1981).

Habermas J 1998. *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*. [Facticity and validity. A contribution to a discourse theory of law and the constitutional state under the rule of law.] Frankfurt am Main: Suhrkamp Edition (first edition 1992).

Habermas J 2001. *The postcolonial constellation, political essays*. Cambridge, Massachusetts: Polity Press.

Hartmann N 1926. *Ethik*. Berlin und Leipzig : Walter de Gruyter.

Hobbes Th 1651. *Leviathan*. Harmondsworth: Pelican edition.

Horneffer R 1933. *Die Entstehung des Staates*. *Beiträge zum öffentlichen Recht der Gegenwart*. Tübingen: Verlag JCB Mohr.

Kammler H 1966. *Der Ursprung des Staates*, *Eine Kritik der Ueberlagerungslehre*. Köln.

Kuyper A 1880. *Souvereiniteit in eigen kring*. Amsterdam: Rodopi. (Presentation at the Inauguration of the Free University of Amsterdam, 20 October 1880.)

Locke J 1690. *Two treatises of civil government*. London: Everyman's Library (1966).

Lowie RH 1921. *Primitive society*. London: George Routledge & Sons.

Maré G 2001. "Race, democracy and opposition in South African politics: As other a way as possible." In Southall 2001: 85-102.

Maré G 2003. "The state of the state: Contestation and race re-assertion in a neoliberal terrain." In Daniel *et al*. 2003: 25-77.

Morriss P 1980. "The essentially uncontestable concepts of power." In Freeman 1980: 198-232.

Münch R 1990. "Differentiation, rationalization, interpenetration: The emergence of modern society." In Alexander 1990: 441-464.

O'Neill J 1973. *Modes of individualism and collectivism*. London: Heinemann.

Parsons T 1969. *Politics and social structure*. New Haven: Yale University Press.

Rawls J 1996. *Political liberalism*. Revised edition. Cambridge: Harvard University Press.

Rawls J 1999. *A theory of justice*. Revised edition, Cambridge: Harvard University Press.

Riedel M 1976. "Der Begriff der 'burgerlichen Gesellschaft' und das Problem seines geschichtlichen Ursprungs." In Böckenförde 1976: 77-108.

Rousseau JJ 1975. *Du contrat social et autres oeuvres politiques*. Paris: Editions Garnier Fréres.

Siegfried K-J 1974. *Universalismus und Faschismus*, *Das Gesellschaftsbild Othmar Spanns*. Vienna: Europaverlag.

Smend R 1930. *Der Staat als Integration*. Berlin und Leipzig: W de Gruyter & Co.

Southall R (ed.) 2001. *Opposition and democracy in South Africa*. London: Frank Cass.

Spann O 1930. *Gesellschaftslehre*. Leipzig: Verlag Quelle & Meyer.

Strauss DFM 2002. "Is it meaningful to juxtapose 'individual' and 'society'?" *Society in Transition* 33(1):96-115.

Strauss DFM 2004. "Transcending the impasse of individualism and universalism in sociological theory." *Society in Transition* 35(1):165-182.

Strauss, DFM 2006. "Beyond the opposition of individual and society, I. Acknowledging the constitutive social function of being an individual and 'de-totalizing' the idea of 'society'." *South African Review of Sociology* 37(2):143-164.

Strauss DFM 2006a. *Reintegrating social theory – Reflecting upon human society and the discipline of sociology*. Frankfurt am Main: Peter Lang.

Strauss DFM 2006b. "The rise of the modern (idea of the) state." *Politikon* 33(2):183-196.

Strauss DFM 2006c. "Democracy between a just public legal order and the ideal of (equitable) transformation." *Politeia* 25(2):151-167.

Strauss DFM 2007. "Beyond the opposition of individual and society, II. The 'category-mistake' entailed in this opposition." *South African Review of Sociology* 38(1):1-19.

Strauss DFM 2008. "Transformasie en die Regstaat (Burgerstaat): Tussen die Scylla van die herstel van begane onreg en die Charybdis van 'n ondemokratiese magstaat-inhoud wat aan die slagspreuk 'verteenwoordigend van die demografie' gegee word." *Die Suid-Afrikaanse Tydskrif vir Geesteswetenskappe* 48(1):58-77.

Talisse RB 2001. *On Rawls*. Belmont: Wadsworth.

Van Creveld M 1999. *The rise and decline of the state*. Cambridge: Cambridge University Press.

Von Wiese L 1959. *Philosophie und Soziologie*. Berlin: Dunkler & Humblot.

Walzer M 1983. *Spheres of justice*: *a defense of pluralism and equality*. New York: Basic Books.

Wood J and Dupont B (eds) 2006. *Democracy, society and the governance of security*. York: Cambridge University Press.